

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH WELLS STAPLETON,

Defendant-Appellant.

UNPUBLISHED

July 31, 2007

No. 264175

Oakland Circuit Court

LC No. 04-197438-FC

Before: Zahra, P.J., and Cavanagh and Schuette, J.J.

ZAHRA, P.J., (*dissenting*).

I respectfully dissent. This case is difficult to resolve and tragic in result, not only because it involves the needless homicide of 44 year-old Peter Richard, but also because it is a case in which many, if not most, objective observers would find sympathy for the defendant, who is currently serving a 20 to 40 year term of incarceration. While I recognize the tragic circumstances of this case and the sympathy that is due not only to the family of the victim, but also to the defendant and his family, I cannot disregard the rule of law applicable to this case. I conclude the majority has mischaracterized the dispositive issue in this case. The majority opinion turns on whether defendant waived his right to effective assistance of counsel. The dispositive issue in this case is not whether defendant waived his fundamental right to counsel but rather whether defendant waived a more general right to call a specific witness—Dr. Werner Spitz, who would have offered expert testimony on the issue of causation. Contrary to the conclusions reached in the majority opinion, I conclude defendant made a valid waiver of his right to call Dr. Spitz to testify at trial. I further conclude defendant’s counsel was not ineffective.¹

Basic Facts and Procedure

1. The Assault and Death of Peter Richard

¹ Defendant has set forth a number of other issues that the majority opinion properly does not address, given the result reached by the majority. My dissent is premised solely on my disagreement with the conclusions reached in the majority opinion. I express no opinion regarding the remaining issues raised by defendant on appeal.

Defendant joined Lance Schmitt to severely beat Peter Richard behind a McDonald's Restaurant on November 20, 2002. Nearly 16 months had passed from the time of the assault until Richard's death. Throughout that time, Richard appeared to be leading a normal life. Richard, however, continued to complain of back pain. Nearly one year after the assault, Richard was diagnosed with a herniated disk. There was substantial evidence presented that would support and refute the conclusion that the herniated disk was the result of the assault by defendant. More than 14 months after the assault, Richard underwent surgery to remove the herniated disk. This surgery was not required and was left to the discretion of Richard, who elected to go forward with the surgery. The surgery appeared to be successful. Five weeks after the surgery, however, Richard died of a pulmonary embolism. The medical examiner discovered a blood clot in Richard's left lung and concluded it was the source of the embolism. The medical examiner determined the manner of Richard's death to be a homicide: the embolism was caused by the surgery to correct the herniated disk that was caused by the assault inflicted on Richard by the defendant.

Defendant pleaded no contest to assault charges stemming from the attack. On March 5, 2003, almost one year prior to the death of Richard, defendant was sentenced to three years' probation. Defendant was on the road to rehabilitation when he learned his assault conviction would be set aside and he would be facing murder charges.

2. The Decision Not to Call Dr. Werner Spitz at Trial

Codefendant Lance Schmitt was appointed counsel who then sought and obtained funds from the Oakland County Circuit Court to retain a medical expert to rebut the prosecution's theory of cause of death. Codefendant's counsel used all of the court provided funds to retain one of the nation's premier medical examiners—Dr. Werner Spitz. Dr. Spitz reviewed the same records reviewed by the Oakland County medical examiner and concluded in a written report that the death of Richard was not the result of the November 20, 2002 attack.

As more fully addressed in *People v Schmitt*, unpublished opinion per curiam of the Court of Appeals (Docket No. 264176) (issued simultaneously with this opinion), a fee dispute arose between codefendant Schmitt and Dr. Spitz². Consequently, Schmitt and his counsel elected not to call Dr. Spitz.

Defendant Stapleton identified Dr. Spitz on his witness list. Stapleton could have issued a subpoena to compel Dr. Spitz to testify. However, after consultation with his counsel, defendant elected not to call Dr. Spitz to testify on his behalf.

The jury convicted defendant of murder in the second degree. This appeal followed.

Analysis

² The facts relating to why codefendant Schmitt elected not to call Dr. Spitz were disclosed in a *Ginther* hearing conducted in the Schmitt case. No *Ginther* hearing was conducted in this case and thus, the factual basis relating to Schmitt's failure to call Dr. Spitz is not fully developed in this record.

1. The Waiver of the Right to Call Dr. Spitz

The majority opinion mischaracterizes the dispositive issue in this case as a waiver of the right to the effective assistance of counsel. The right to counsel is a fundamental right. The standards for waiving a fundamental right are much higher than the waiver standards for non-fundamental rights. “While the defendant must personally make an informed waiver for certain fundamental rights such as the right to counsel or the right to plead not guilty, for other rights, waiver may be effected by action of counsel.” *People v Carter*, 462 Mich 206, 217; 612 NW2d 144 (2000). To ordinarily waive a right knowingly and intelligently, the defendant must only understand the nature of the right and how it would likely apply “*in general*” to the circumstances—even though “the defendant may not know the *specific detailed* consequences of invoking it.” *United States v Ruiz*, 536 U.S. 622, 629; 122 S Ct 2450 (2002).

In this case, defendant generally understood the value of calling a causation expert to testify on his behalf. Defendant further understood the risks associated with calling Dr. Spitz after Dr. Spitz stated he had not and would not prepare to testify at trial. The record in this case establishes that defendant made an informed, knowing, voluntary and intelligent waiver of his right to call Dr. Spitz. After the last witness testified at trial, codefendant Schmitt and defendant Stapleton were put under oath and questioned about whether each wanted to call Dr. Spitz to testify:

[McCarthy]. Up until at least two weeks ago we had intended to have Dr. Spitz testify as a witness for your defense, correct?

[Schmitt]. Yes.

[McCarthy]. Have you been made aware by myself of the developments with Dr. Spitz over his complaint about a fee?

[Schmitt]. Fully aware.

[McCarthy]. And you’ve been informed by myself that the most recent conversation I had with [Dr. Spitz] was two days ago at which time he informed me while he would be here he would not prepare the case for trial?

[Schmitt]. Yes.

[McCarthy]. And then you and I discussed that could be very devastating to have a person come and testify on your behalf whose testimony I wouldn’t have any faith in prior to the time they took the witness stand?

[Schmitt]. Yes.

[McCarthy]. He indicated to me he wasn’t going to cooperate with me. He wasn’t going to give me the time in which he needed to be adequately prepared and render his opinion under oath before the jury, correct?

[Schmitt]. Yes, he said that.

[McCarthy]. So then at the conclusion of those discussions you instructed me that it's your choice to not have Dr. Spitz called on your behalf; is that correct?

[Schmitt]. That's correct.

Immediately afterward, defendant was put under oath and testified he was informed of the benefits of Dr. Spitz's testimony and the risks and the consequences of calling Dr. Spitz to the witness stand in his case:

[Defense Counsel]. Mr. Stapleton, you've just heard the comments of Mr. McCarthy and your codefendant, Lance Schmitt, have you not?

[Defendant]. Yes.

[Defense Counsel]. And the same advice that was stated, given by McCarthy to Mr. Schmitt you and I went over as well.

[Defendant]. Yes.

* * *

[Defense Counsel]. And with regards to Dr. Spitz, you've discussed that matter, you've discussed this matter with Lance and with Mr. McCarthy and you feel based upon all that you've heard about the speaking back and forth with Mr. McCarthy you also feel that it's the best interest not to have him testify for you?

[Defendant]. Yes, sir.

[Defense Counsel]. Are you satisfied with the advice I've been giving to you?

[Defendant]. Yes, sir.

[Defense Counsel]. And you, and it is your free and voluntary decision with regard to all these three issues made here in court?

[Defendant]. Yes, sir.

Defendant recognized that Dr. Spitz was not cooperative and would not dedicate any time to prepare and offer an opinion at trial. Defendant acknowledged it was his choice not to have Dr. Spitz testify at trial.

On these facts, I conclude defendant meaningfully participated in the decision not to call Dr. Spitz to testify and therefore waived any objection to the decision not to call Dr. Spitz to testify at trial. Waiver is the "intentional relinquishment or abandonment of a known right" that actually extinguishes any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144

(2000). Thus, defendant's waiver forecloses appellate review of any effective assistance of counsel claim arising out of not calling Dr. Spitz.

2. Ineffective Assistance of Counsel

Even if I were to conclude that defendant did not make a proper and valid waiver of his right to call Dr. Spitz to testify on his behalf, the critical issue in this case would not be, as stated in the majority opinion, whether defendant waived his right to the effective assistance of counsel. Rather, the critical issue would be whether defendant's counsel was ineffective for failing to call Dr. Spitz or otherwise present a causation expert on behalf of defendant. Defendant specifically claims his counsel, Arnold Weiner, was ineffective because he failed to call Dr. Spitz as an expert witness notwithstanding his indication he would not prepare for trial.

The United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show that: 1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; 2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and 3) the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective. *LeBlanc*, *supra* at 578.

a. Failing to Call Dr. Spitz

The majority opinion concludes defense counsel was ineffective for failing to call Dr. Spitz to testify. This cannot constitute ineffective assistance of counsel, as the decision not to call Dr. Spitz was a contemplated trial strategy. Failed trial strategy cannot form the basis of a claim of ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Moreover, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). The majority opinion concludes that Dr. Spitz would have testified that the death of Richard was not proximately caused by the November 2002 attack. The majority opinion reasons that Dr. Spitz's testimony might have shown that the assault did not cause the herniated disk, which in turn led to the surgery that in turn led to the fatal blood clot.

However, defense counsel presented ample evidence refuting the element of causation. Defense counsel presented evidence that Richard may have violated restrictions on lifting. On cross-examination, defense counsel elicited testimony from Dr. Fernando Diaz that Richard's weightlifting could cause a disk to rupture. Diaz also admitted that there was no proof that the assault was the source of the blood clot. Dr. Kurt Coulter testified that he did not believe Richard had a ruptured disk. Dr. Richard Moyer, a defense witness, did not suspect a herniated

disk in November 2002 or January 2003. Defense counsel challenged Dr. Virani's determination that Richard's death was a homicide by showing that Dr. Virani did not have access to all of Richard's medical records. Defendant presented substantial evidence that it was not possible to ascertain when the disk ruptured or whether the November 2002 assault caused it.

In sum, defense counsel presented to the jury the evidence and argument that the assault did not cause the herniated disk. Dr. Spitz's putative testimony would have done no more than challenge the causal connection between the herniated disk and the assault. Therefore, defendant was not deprived of a substantial defense. *Hoyt, supra* at 537-538.

Conclusion

Defendant waived his right to call Dr. Spitz to testify on his behalf. Defendants' counsel was not ineffective. The jury heard all the competing evidence and elected to find defendant guilty of murder in the second degree. Defendant's conviction ought not be reversed because defendant elected not to call his retained expert to testify at trial.

/s/ Brian K. Zahra